FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1149

FLORIDA DEPARTMENT OF CORRECTIONS,

Appellant,

v.

MCMILLAN C. GOULD,

Appellee.

On appeal from the Circuit Court for Leon County.
Karen A. Gievers, Judge.

August 12, 2022

ON MOTION FOR CERTIFICATION

TANENBAUM, J.

The court denies the motion for certification filed by the Florida Department of Corrections. A supermajority (thirteen of us) carefully considered the motion and voted to deny it. This decision, like the merits decision that preceded it in this case (also by a supermajority, albeit a slightly smaller one), was born out of a fidelity to the law. Article V, section 3(b)(4), of the Florida Constitution allows the Supreme Court of Florida jurisdiction over a decision of ours "that passes upon a question certified by [us] to be of great public importance" or that we certify "to be in direct

conflict with a decision of another district court of appeal." Those of us voting to deny the motion treated the department's request for each of these certifications seriously and simply concluded that certification was not warranted.

The fact remains that this court had the rectitude to publicly correct itself and bring itself in line with the statutory text. There is no time-bar on getting it right. Such a correction on its own, though, does not suddenly make the underlying question one of great public importance. This unceremonious self-critique and self-correction is just something the public should expect of a district court of appeal—no need for plaudits or laudation or further comment. Public confidence in the judiciary is bolstered by such action alone.

The minor effect the en banc decision might have on a handful of prisoners (speaking relatively, that is: around five hundred out of a prison population of roughly 80,000) does not change the analysis counseling against certification. This, of course, does not mean the court does not take the concerns of the department seriously. Most of the department's operational cases come on appeal to this court; we are ever mindful of the impact our decisions have on the good work that the department performs to implement Florida's criminal punishment code.

But our North Star is the text. This faithfulness has impelled us to correct a glaring error that we made twenty years ago in how we apply the definition of "criminal attempt"—as that offense is described in section 777.04—in the context of the incentive gain-time statute. This faithfulness impels a vote against certification as well. The minor inconvenience the department might suffer from having to retroactively *consider* the relatively few eligible prisoners for gain-time does not qualify as a matter of great importance to the public. The gain-time statute excludes prisoners besides just sex offenders, by the way; but the identity or class of prisoner who might be marginally affected is of no moment regarding the certification decision. At all events, there is no chance of the prison gates suddenly swinging open for anyone. Considering a prisoner for gain-time is not the same as awarding him gain-time, and by law, all of Florida's prisoners now must serve at least eighty-five percent of their sentences. Under these

circumstances, the department's suggested impact of the en banc decision is not a sufficient basis to certify the matter as requiring the attention of our highest court.

We also reject the department's suggestion of "direct conflict" between the en banc decision here and the decisions of the Fifth District Court of Appeal that it cites. Our decision here is to affirm the trial court's issuance of mandamus compelling the department to consider Gould for incentive gain-time. That decision is based on an application of the criminal attempt statute and the incentive gain-time statute. The Fifth District's decisions all had to do with a separate statute governing sex offender probation—not a certifiable conflict under the constitution.

Even a closer look fails to uncover a conflict that we credibly could certify. To be sure, the Fifth District previously has cited *Wilcox v. State*, 783 So. 2d 1150 (Fla. 1st DCA 2001), which we now have receded from. As our en banc merits opinion in this case notes, though, *Wilcox* for the most part just pronounced, without legal analysis, a proposition that we now have receded from as being contrary to the statutory text. In none of the opinions in which the Fifth District cited *Wilcox* did it tack on any analysis of its own. *See, e.g.*, *State v. Thurman*, 791 So. 2d 1228, 1230 (Fla. 5th DCA 2001) ("We agree with *Wilcox* that it was not improper for the trial court to subject Thurman to sex offender probation conditions."); *Donovan v. State*, 821 So. 2d 1099, 1102 (Fla. 5th DCA 2002) ("In *State v. Thurman,* 791 So.2d 1228 (Fla. 5th DCA 2001), we adopted the reasoning in *Wilcox,* holding that it was not improper for the trial court to subject a defendant to sex offender probation conditions when he pled no contest to an attempted lewd act upon a child."); *State v. Fureman*, 161 So. 3d 403, 408 (Fla. 5th DCA 2014) ("This court reaffirmed its holding in *Donovan v. State,* 821 So.2d 1099, 1102 (Fla. 5th DCA 2002), noting that we had previously adopted the reasoning of *Wilcox* and held that attempted sexual battery is an offense under the sexual battery statute, as opposed to the attempt statute.").

We cannot now say, then, that our analysis in the en banc merits opinion in this case conflicts with the analysis in any of the Fifth District's opinions, which all just cite us and our decision in *Wilcox*. Now that the current en banc majority has receded from

that decision and reached a different conclusion—and backed the conclusion up with detailed reasoning—perhaps the Fifth District, or any of the other district courts, will consider the issue anew and publish its own analysis. If there is agreement with our analysis, the supreme court will not need to get involved. If one or more district courts instead set out reasoning that leads to a conflicting conclusion on the same question, the supreme court will be available to resolve the conflict once it ripens.

In the end, the parties and the public can rest assured that this court's judges have done their duty, and they have done it out in the open. The supermajority has owned up to a prior mistake of this court regarding a matter of statutory interpretation, explained the error in detail, and set out an analysis behind this court's decision in this case that is true to the text. A slightly bigger supermajority has closely considered the department's arguments for certification to the supreme court and found no constitutional basis for granting the department's certification request. There is nothing more to our denial of the motion than that.

ROWE, C.J., and ROBERTS, RAY, OSTERHAUS, WINOKUR, JAY, M.K. THOMAS, NORDBY, and LONG, JJ., concur.

B.L. THOMAS, J., concurs with an opinion in which ROWE, C.J., and ROBERTS, OSTERHAUS, and WINOKUR, JJ., join.

LEWIS and KELSEY, JJ., concur in result only.

MAKAR, J., dissents with an opinion in which BILBREY, J., joins.

B.L. THOMAS, J., concurring in the denial of certification.

I concur in the Court's opinion denying the Department's motion for certification. I write separately to address Judge Makar's opinion dissenting from our denial of the motion, as that opinion includes what I consider to be three incorrect assertions regarding the decision of thirteen judges to deny the motion. I also disagree with Judge Makar's dissenting opinion on the merits of the motion.

First, I am confident that not one of Judge Makar's thirteen colleagues who disagreed with his view of the motion have "ignor[ed]" the motion. I have full faith in my colleagues that they read the motion, evaluated its merits, and made a thoughtful decision, including the two colleagues with whom I disagree.

Second, I am equally confident that not one of the thirteen colleagues who voted to deny the motion "feigns that this case's impact is no big deal[."] This is easily disproven by the simple fact that this Court chose to hear this case en banc.

Finally, this Court did not fail to "acknowledge what it has done." We reversed a prior incorrect panel decision which incorrectly held that the Department of Corrections could refuse to consider a statutorily awarded reduction of up to a maximum of fifteen percent of the total sentence of a state prisoner who had not been convicted of a violation of section 794.011, Florida Statutes, but rather, was convicted of an attempted crime as defined under section 777.04(1), Florida Statutes. Our en banc majority decision correctly interpreted section 944.275(4)(e), Florida Statutes, to hold that persons convicted of a violation of section 777.04(1) could not be excluded from consideration for incentive gain-time due to the undeniable fact that such offenders had not been convicted of a violation of section 794.011. We analyzed the relevant statutes at length and certainly did not fail to acknowledge the precise legal question at issue and the correct resolution.

Judge Makar states that this Court should certify this case to the Florida Supreme Court because certification "can be a show of confidence rather than infirmity" should the supreme court agree with our en banc decision. But as we stated recently, "[t]he supreme court has warned district courts about using certification merely for the purpose of seeking its approval of a decision." *Vickery v. City of Pensacola*, No. 1D19-4344, 2022 WL 480742, at *18 (Fla. 1st DCA Feb. 16, 2022) (opinion on motion for rehearing, clarification, rehearing en banc, and certification of questions of great public importance). In *Owens-Corning Fiberglas Corp. v. Ballard*, the supreme court surmised that a certified question "appears to be more of a request for our approval of the conclusion reached by the court below than an issue involving great public importance." 749 So. 2d 483, 485 n.3 (Fla. 1999). "In most cases we

would discourage district courts from asking for this kind of check on its decision as a question of great public importance." *Id.* This admonishment applies here. Certification does not exist for the supreme court to "check" our decisions or to affirm our confidence in our own opinions.

The majority also correctly denies the motion to certify conflict on the merits because there is no conflict with another district court's decision. The Florida Constitution states that the supreme court may review a decision of a district court that "*directly conflicts* with a decision of another district court of appeal . . . on the *same question of law"* or is certified by that district court "to be in *direct conflict* with a decision of another district court of appeal." Fla. Const. art. V, § 3(b)(3)–(4) (emphasis added). The Fifth District cases that Appellant and Judge Makar state are in conflict with our en banc decision all involve whether an offender can be subject to certain sex-offender *probationary terms*, not incentive gain-time consideration under section 944.275(4)(e), Florida Statutes. The supreme court has made clear that purported conflict between cases addressing "two distinct situations" with different "factual circumstances" does not invoke its jurisdiction to hear a case, even when conflict *was certified* by the district court. *State v. Lovelace*, 928 So. 2d 1176, 1177 (Fla. 2006). As this case addresses different legal issues than those addressed by the Fifth District cases, there is no conflict.

Furthermore, our adherence to the text in this case addresses the criminal-attempt statute and does not address a legislative policy enacted to exclude offenders convicted of *completing* the commission of a designated offense such as sexual battery. In fact, that is why the Legislature generally provides more lenient punishment for attempted crimes both in terms of sentence and, as here, in declining to exclude those offenders who attempt, but do not complete, certain felony crimes from consideration for incentive gain-time. Section 777.04(4)(a)–(f), Florida Statutes, provides that "the offense of criminal attempt" shall be ranked one level below the offense attempted for the purposes of sentencing under chapter 921, and most significantly here, reduces almost *every* felony and misdemeanor degree by one degree below the substantive offense attempted, including even capital crimes.

This statutory leniency for the punishment of the "offense of criminal attempt" does not exclude the attempted offense at issue here, although the statute does provide other specified exceptions. The logic, morality, and intended prevention of social evils of this legislative policy of leniency for attempted offenses is easy to discern: if the law fails to provide leniency for an attempted offense, an offender could decide to commit the completed crime, understanding that to engage in additional criminal conduct and inflict more pain or death on a victim does not incur additional punishment. Thus, the lack of this legislative policy would actually impose greater suffering and death on victims of crime. This explains why the legislative history of this more-lenient treatment of the offense of criminal attempt was established almost a half-century earlier, and that legislation amended earlier legislation providing for even-more lenient punishment for the "offense of criminal attempt." *See* Ch. 74-383, § 12, Laws of Fla. Significant here, section 777.04(a) further directs that the policy of sentencing leniency must be considered in "*determining incentive gain-time eligibility* . . . ." (emphasis added).

Thus, I concur in the Court's correct decision denying the motion to certify conflict or a question of great public importance.

ROWE, C.J., and ROBERTS, OSTERHAUS, and WINOKUR, JJ., concur.

MAKAR, J., dissenting from denial of certification.

The Florida Department of Corrections, assisted by the Office of the Solicitor General, makes a most modest request, which is to certify that the sua sponte en banc decision in this case—reversing over two decades of district precedent—conflicts with cases of the Fifth District Court of Appeal that relied on the now forsaken precedent. *See* Art. V, § 3(b)(4), Fla. Const. (supreme court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal."). The same is true as to the Department's request for a certified question of great public importance.

Regarding the former, it is a minimal ask. As the Solicitor General notes, irreconcilable conflict now exists because the Fifth

District cases had adopted and relied upon the decisions abandoned in *Wilcox v. State*, 783 So. 2d 1150 (Fla. 1st DCA 2001) and *Zopf v. Singletary,* 686 So. 2d 680 (Fla. 1st DCA 1996), making it glaringly obvious that a newborn conflict was created. ("In deciding to hear this case en banc and overruling *Wilcox* and language in *Zopf*, the majority acknowledged that its holding conflicted with those precedents, and thus necessarily also with the Fifth District's decisions adopting them."). As an example, the Solicitor General points out that the majority's holding "is in direct conflict with the Fifth District's decisions: In this district, an attempted sexual offense is an offense under the attempt statute, while in the Fifth District an attempted sexual offense is an offense under the substantive sexual offense statute." Conflict of this sort cries out for resolution.

Plus, when an appellate court overturns over two decades of its precedent—cases that another district has adopted and a critical executive branch agency has followed in its decision-making—the court ought to acknowledge what it has done, certify conflict, and allow for per se supreme court jurisdiction. *State v. Vickery,* 961 So. 2d 309, 312 (Fla. 2007) (noting "that a certification of conflict provides us with jurisdiction per se"). After all, the supreme court might agree with the majority and thereby resolve the conflict in its favor; certification can be a show of confidence rather than infirmity. At the least, certification gives the supreme court jurisdictional license—after full briefing by the affected parties and governmental agencies—to provide guidance to the districts on how the legal questions presented are to be resolved prospectively on a uniform statewide basis. Absent supreme court review, conflict persists and incongruent outcomes result; not good.

The failure to certify conflict, of course, does not preclude the Department from seeking discretionary review by persuading the supreme court that "express and direct" conflict jurisdiction exists. *See* Art. V, § 3(b)(3), Fla. Const. (supreme court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."). The supreme court is likely to accept review on this basis, demonstrating why certification by this Court ought to be done as a matter of course

and expediency, thereby relieving the Department and the supreme court from unnecessarily devoting even more resources to the question of whether "conflict" exists for jurisdictional purposes; it clearly does. And the conflict exists whether a case involves gain-time or probation matters; the Fifth District's reliance on the now-jettisoned legal reasoning in *Wilcox, Zopf*, and related cases, is the crux of the conflict. The important point is that the underlying substantive legal issues need to be resolved by the supreme court so that every Florida court and every affected state and local agency and official have a common understanding of the legal playing field when it comes to what constitutes attempted crimes and prison release determinations.

For this reason, the request for certification of a question of great public importance ought to be granted as well. As the Solicitor General notes, critical legal issues of statewide importance are presented, and substantial arguments advanced, making it necessary that the confusion created by this case be eliminated. It can't be feigned that this case's impact is no big deal; the potential for those who attempt to sexually assault minors to obtain early release is more than mere esoterica affecting a mere handful of felons. As the Department points out, the Court's en banc decision "could result in substantially shorter sentences for approximately 482 inmates currently serving time for attempted sexual battery[,]" including "retroactive incentive gain-time that under the [en banc Court's] decision should have been earned from 2014 onwards." Stated succinctly, "because of this Court's decision, nearly five hundred inmates convicted of a sexual offense could be entitled to earlier release from incarceration." Not to mention the en banc decision's broader impact in destabilizing the law of attempt generally, which can't be quantified, but is substantial in scope and practical impact.

Plus, ignoring a modest and respectful request for a certified question from the executive branch of government is ill-advised, particularly when an important part of what the Department does is to serve the citizenry by protecting public safety; the same is true as to the prosecutors, public defenders, and trial judges, who need less legal confusion in the daily performance of their jobs. As such, I would grant the Department's request to certify conflict with the Fifth District and to certify a question of great public

importance as phrased by the Department (i.e., "Whether inmates convicted of attempted sexual battery are eligible for incentive gain-time under section 944.275(4)(e), Fla. Stat."). The supreme court, of course, is free to rephrase this question to encompass other important issues presented in this case. This case was initially a run-of-the-mill case, deserving a perfunctory disposition, but the en banc decision has altered the legal landscape, creating an urgent need for supreme court review.

BILBREY, J., concurs.

Lance E. Neff, General Counsel; Beverly Brewster, Assistant General Counsel, and Mark S. Urban, Deputy General Counsel, Florida Department of Corrections, Tallahassee; and Ashley Moody, Attorney General, and Sheron Wells and Kristin J. Lonergan, Assistant Attorneys General, Tallahassee; Henry C. Whitaker, Solicitor General, Jeffrey Paul DeSousa, Chief Deputy Solicitor General, and Christopher J. Baum, Senior Deputy Solicitor General, Miami, for Appellant.

Terrence E. Kehoe, Orlando, for Appellee.